

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
July 1, 2018 Annual Access Charge Tariff	)	W.C. Docket No. 18-100
Filing	)	
	)	
South Dakota Network, LLC	)	Transmittal No. 13
Tariff F.C.C. No. 1	)	

**JAMES VALLEY COOPERATIVE TELEPHONE COMPANY’S AND  
NORTHERN VALLEY COMMUNICATIONS, LLC’S OPPOSITION TO THE  
DIRECT CASE OF SOUTH DAKOTA NETWORK, LLC**

G. David Carter  
John C. Nelson

Innovista Law PLLC  
1825 K Street, NW  
Suite 508  
Washington, DC 20006  
202-869-1502 (Tel.)  
202-869-1503 (Fax)  
[david.carter@innovistalaw.com](mailto:david.carter@innovistalaw.com)  
[john.nelson@innovistalaw.com](mailto:john.nelson@innovistalaw.com)

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## **EXECUTIVE SUMMARY**

In its 2011 *Connect America Fund Order*, the FCC entirely overhauled the access charge regime, setting CLEC terminating end office access rates on a path towards bill-and-keep. The initial phases of this reform have been implemented by a unified CLEC effort to phase-in mandated reductions to end office access charges. However, one carrier – South Dakota Network, LLC – has evaded these requirements, choosing instead to bill carriers a unified benchmark rate that includes both originating and terminating traffic, despite the fact that a significant portion of this unified rate involves an end office access component that *must* be stepped down.

SDN's unified benchmark approach, and its rate calculation, is unjust and unreasonable for several reasons. First, under the FCC's *Connect America Fund Order*, SDN must prescribe separate, independent rates for its originating and terminating access services, which it fails to do. Second, SDN fails to properly justify including an equal access charge in its terminating benchmark calculation, as the NECA tariff it benchmarks to provides no distinction between the premium and non-premium local switching rate for terminating traffic. Third, with respect to the equal access component of SDN's originating access rate, SDN fails to provide sufficient data and evidence showing that it correctly calculated a weighted average for its equal access service.

With respect to each of these issues, SDN has failed to meet its burden of proof under Section 204(a)(1). Accordingly, the Commission should examine SDN's originating and terminating rates separately, after which it should order SDN: (1) to refile its tariff with a terminating rate at or below the \$.002288 per-minute rate included in CenturyLink's tariff; and (2) either refile its tariff with its originating access rate divided into one for carriers billing non-premium local switching pursuant to the NECA tariff and one for all other subtending LECs or file a composite rate for originating traffic that proves it correctly calculated a weighted average for its equal access service.

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James Valley Cooperative Telephone Company (“JVCTC”) and Northern Valley Communications, LLC (“NVC”), by its undersigned counsel, respectfully submit their Opposition to the Direct Case of South Dakota Network, LLC (“SDN”)<sup>1</sup> in response to the Commission’s November 29, 2018 Order Designating Issues for Investigation in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION**

More than seven years ago, the Commission began a process to reform intercarrier compensation, establishing bill-and-keep as the ultimate end state.<sup>3</sup> The first part of this reform has been implemented by a phased-in reduction of end office access charges for terminating end office access. SDN, however, has proffered a unified benchmark rate for both originating and

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<sup>1</sup> See Direct Case of South Dakota Network, LLC, *In re July 1, 2018 Annual Access Charge Tariff Filings, South Dakota Network, LLC*, WC Docket No. 18-100 (Dec. 11, 2018) (“SDN Direct Case”).

<sup>2</sup> See *In re July 1, 2018 Annual Access Charge Tariff Filings, South Dakota Network, LLC Tariff F.C.C. No. 1*, WC Docket No. 18-100, Order Designating Issues for Investigation, DA 18-100 (Nov. 29, 2018) (“Designation Order”).

<sup>3</sup> See *In re Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C. Rcd. 17663 ¶ 34 (2011), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (“Connect America Fund Order”).

terminating traffic, despite the fact that a significant portion of its unified rate involves an end office access component. SDN's approach is unreasonable and, thus, unlawful. SDN's terminating access services must be examined independently from its originating access services.

As explained more fully below, SDN cannot justify including a charge related to "equal access" in its terminating benchmark calculation because the NECA tariff its benchmarking relies on has no price differential between premium and non-premium local switching for terminating traffic. Rather, SDN's benchmark for terminating traffic is only the rate for CenturyLink's tandem switching element, which is currently \$.002288 per minute.

With respect to SDN's originating access rate, JVCTC and NVC agree with SDN's argument that, if it benchmarked its rates, it would be permitted to bill for the equal access component of its services, at least under certain circumstances. Specifically, SDN would be permitted to bill an equal access charge for traffic originating from carriers that participate in or mirror the NECA tariff, provided the subtending LEC bills IXCs for non-premium local switching. However, because SDN has failed and refused to provide adequate data related to this issue, the Commission must conclude that SDN has not met its burden of proof to establish that it calculated the CLEC benchmark rate in a reasonable and lawful manner.

## **II. LEGAL STANDARD**

Under Section 204(a)(1) of the Communications Act, "the burden of proof to show that [a carrier's] new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier."<sup>4</sup> And as the Commission made clear in its *Designation Order*, "SDN's provision of the

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<sup>4</sup> 47 U.S.C. § 204(a)(1).

information requested in this Order is necessary to determine whether SDN's revised switched access rate is just and reasonable.”<sup>5</sup>

The Commission has determined that a carrier fails to meet its burden of proof under Section 204 when it fails to provide detailed data and calculations to support its rates. As the Commission explained:

Reliable data are essential to the Commission's ability to conduct tariff reviews and investigations, ensure just and reasonable rates, and, if necessary, to prescribe rates. NECA's failure to comply fully with the *Designation Order* leaves us with insufficient and unreliable data, such that we are unable to develop the necessary certainty to permit us to conclude that the rates should be deemed lawful. We find that NECA has failed to meet its burden of proof in this proceeding under section 204 of the Act to warrant a finding that its proposed rates are just and reasonable and should be deemed lawful rates not subject to potential refund for overearnings.<sup>6</sup>

Accordingly, SDN must support its rate calculations with more than just textual assertions of reasonableness; it must provide the data necessary to enable the Commission to determine the accuracy of the rates with certainty.

### **III. DISCUSSION**

#### **A. SDN Must Utilize Distinct Originating and Terminating Access Charge Benchmarks**

SDN's analysis of the competing ILEC benchmark rate is fundamentally flawed because it presents a unified composite rate that it contends is applicable for both originating and terminating access traffic. Given the reforms that the Commission has implemented with regard to terminating end office access charges, SDN's decision to calculate a unified benchmark rate is unreasonable.

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<sup>5</sup> *Designation Order* ¶ 8.

<sup>6</sup> *In re July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 F.C.C. Rcd. 23877, 23886 ¶ 24 (2004) (“*July 1, 2004 Annual Access Charge Order*”).

It is inescapable that, under the Commission’s current access charge regulations, any service that involves an end office component **cannot** produce the same results for both originating and terminating access. This inescapable conclusion flows directly from the Commission’s 2011 *Connect America Fund Order*, in which the Commission began a process of entirely overhauling the access charge regime and, in so doing, set end office terminating access rates on a path towards bill-and-keep.<sup>7</sup> Specifically, the *Connect America Fund Order* set the terminating end office rate elements for price cap carriers (and the CLECs that benchmark to them) on a six year glide path to bill-and-keep, while setting the terminating end office rate elements for rate-of-return carriers (and the CLECs that benchmark to them) on a nine year glide path to bill-and-keep.<sup>8</sup> Notably, the transition to bill-and-keep established by the Commission in 2011 had no immediate impact on either originating end office access or tandem switching and its related transport services, except to cap those rates at existing levels.<sup>9</sup>

The Commission’s reforms to CLEC terminating end office rates compels an examination of SDN’s terminating rates *independently* from its originating rates. SDN’s assertion that “equal access – a function of local end office switching – and tandem switching are two separate elements of access services”<sup>10</sup> conclusively establishes that it is necessary for SDN to distinguish between its originating and terminating rates. In other words, because equal access is a “function of local end office switching,” and because end office switching rates differ dramatically today depending on whether the traffic is originating or terminating, SDN’s submission of only a single, unified rate is unreasonable and, therefore, unlawful.

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<sup>7</sup> See *Connect America Fund Order* ¶ 34.

<sup>8</sup> See *id.* ¶¶ 801, 807.

<sup>9</sup> See *id.* ¶ 798.

<sup>10</sup> SDN Direct Case at 4; see also *id.* at 13 (“SDN provides equal access functionality, which is one of the functional parts of local end office switching”) (emphasis in original).

JVCTC’s and NVC’s conclusion that SDN’s originating and terminating traffic cannot have the same benchmark is underscored by several related factors, chief among them being that the methodology presented by SDN as the basis for its benchmark for “equal access” produces distinctly different results for originating traffic and terminating traffic. Specifically, SDN contends that the rate it assigns to the “equal access” functionality it performs “is the difference between the premium and non-premium rates for local end office switching” found in the NECA tariff.<sup>11</sup> Assuming for purposes of this discussion that SDN’s position is valid, SDN’s calculation highlights precisely why the benchmark for originating and terminating access cannot be the same.

The NECA tariff assigns different rates for local switching depending on whether it is originating or terminating traffic. With respect to originating traffic, a differential between premium and non-premium traffic does exist, as demonstrated in the following table:

	Premium Local Switching – Originating Access Minute <sup>12</sup>	Non-Premium Local Switching - Originating Access Minute <sup>13</sup>	Difference
Band 1	0.014678	0.006605	0.008073
Band 2	0.019572	0.008808	0.010764
Band 3	0.024464	0.011010	0.013454
Band 4	0.029358	0.013211	0.016147
Band 5	0.034251	0.015413	0.018838
Band 6	0.039143	0.017614	0.021529
Band 7	0.044037	0.019818	0.024219
Band 8	0.048930	0.022019	0.026911

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<sup>11</sup> *Id.* at 14

<sup>12</sup> NECA Tariff F.C.C. No. 5, § 17.2.3(A), 53d Revised Page 17-11.

<sup>13</sup> *Id.*, 36th Revised Page 17-11.1.



However, with respect to terminating traffic, no such differential exists. Instead, as demonstrated in the following table, the NECA tariff assigns no price differential for premium and non-premium local switching for terminating traffic:

	Premium Local Switching - Terminating Access Minute <sup>14</sup>	Non-Premium Local Switching - Terminating Access Minute <sup>15</sup>	Difference
Band 1	0.002133	0.002133	0
Band 2	0.002133	0.002133	0
Band 3	0.002133	0.002133	0
Band 4	0.002133	0.002133	0
Band 5	0.002133	0.002133	0
Band 6	0.002133	0.002133	0
Band 7	0.002133	0.002133	0
Band 8	0.002133	0.002133	0

JVCTC’s and NVC’s conclusion that SDN’s benchmark for originating traffic could not be the same as its benchmark for terminating traffic is also underscored by how SDN describes the “equal access” component of its rate. Specifically, the Description and Justification filed by SDN on September 17, 2018, explained that it “determined the equal access service benchmark based on the weighted average differential between premium and non-premium **originating** local switching rates in the NECA tariff billed by the routing exchange carriers utilizing the tandem” and that it “weighted the equal access benchmark” based on the “**originating** interstate access minutes routed through SDN’s tandem.”<sup>16</sup> Accordingly, even when SDN calculated the equal access component of its purported benchmark rate, it was readily apparent that this element

<sup>14</sup> *Id.*, 53d Revised Page 17-11.

<sup>15</sup> *Id.*, 36th Revised Page 17-11.1.

<sup>16</sup> South Dakota Network, LLC Tariff F.C.C. No. 1, Centralized Equal Access Service, 2018 Annual Access Tariff Filing, Description and Justification, at 3 (Sept. 17, 2018) (“Description and Justification”).

could not reasonably be applied to terminating traffic as well. It is for this reason that the *Designation Order* states that “SDN concedes [that] the NECA equal access charge only applies to originating access service.”<sup>17</sup>

In SDN’s Direct Case, however, rather than conceding that the benchmark rate for originating and terminating traffic must be different, SDN instead offers up a series of weak – and often befuddling – excuses for its misguided unified rate approach. Each of these excuses can be readily dispensed.

First, SDN contends that “to the extent that SDN’s terminating rate could be reduced by removing equal access costs, its originating rate would increase, resulting in no net benefit to IXCs.”<sup>18</sup> Perhaps this argument would have a modicum of persuasive power if SDN’s rates were being set based on a cost study, but for a CLEC setting its rates based on a benchmark, it is nonsensical. If SDN’s rates are set based on a benchmark, its costs are irrelevant. Thus, a reduction in its terminating rate would produce just that – a reduction in its terminating rate, with no corresponding effect on its originating rate.<sup>19</sup>

Second, SDN argues that separating its “originating and terminating rate would impose cost on both SDN and IXCs.”<sup>20</sup> SDN contends that it would “incur additional cost to calculate and bill separate charges, including the handling of disputes as to whether traffic was properly

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<sup>17</sup> *Designation Order* ¶ 15.

<sup>18</sup> SDN Direct Case at 18.

<sup>19</sup> SDN’s argument also does not address how the cap on all access charges adopted in the *Connect America Fund Order* would limit SDN’s ability to shift costs to its originating access charges. See *Connect America Fund Order* ¶ 801 (“Thus, at the outset of the transition, **all interstate switched access** and reciprocal compensation rates **will be capped** at rates in effect as of the effective date of the rules. We cap these rates as of the effective date of the Order, as opposed to a future date such as January 1, 2012, to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order.”) (emphasis added).

<sup>20</sup> SDN Direct Case at 19.

identified as originating and terminating.”<sup>21</sup> SDN’s representation that carriers in 2018 have difficulty distinguishing between originating and terminating traffic is absurd. SDN’s switching and billing equipment already distinguishes between originating and terminating traffic because the subtending LECs – each of which rely on SDN’s records to render their access bills – had to begin billing different rates for originating and terminating traffic many years ago. This perhaps explains why SDN offers nothing to substantiate its representation that billing two distinct rates would result in any material cost increases for SDN. Accordingly, the Commission can reasonably conclude that the only “cost” for SDN to bill different rates for originating and terminating traffic would be the few minutes of time required to update the rate tables in its billing system, which, of course, is an exercise that SDN has to do anytime it adjusts its rates.

Of course, even if SDN could have demonstrated some material cost associated with charging disparate rates for originating and terminating traffic, it would nevertheless be reasonable to impose that cost on SDN. The Commission has required every provider of end office access to reduce its terminating access rates and establish different rates for originating and terminating traffic.<sup>22</sup> Thus, to the extent that SDN continues to provide an end office switching function, there is absolutely no justification for SDN to be excluded from this requirement, particularly when doing so would result in SDN overcharging for terminating access traffic, which accounts for more than half of SDN’s total traffic.<sup>23</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *See Connect America Fund Order* ¶¶ 801, 807.

<sup>23</sup> *See* SDN Direct Case at 18 (asserting that over half of its traffic is terminating). As JVCTC and NVC have already informed the Commission, any representations that SDN makes regarding traffic volumes warrant very careful scrutiny because SDN has *switched* 495,684,084 minutes of traffic bound for NVC alone, yet SDN’s tariff projects only 130 million minutes of traffic for July 2018 – June 2019. *See* Petition of James Valley Cooperative Telephone Company and Northern Valley Communications, LLC to Reject or to Suspend and Investigate South Dakota Network, LLC’s Tariff, Transmittal No. 13, at 17 (Sep. 24, 2018).

Third, SDN attempts to gloss over the glaring problems with its consolidated rate method by erroneously claiming that Commission precedent supports a “zone of reasonableness” approach to ratemaking because ratemaking is “not an exact science.”<sup>24</sup> However, SDN can find no comfort in the Commission precedent it seeks to rely upon, as the *Cable Competition Order* does not support the notion that a carrier, like SDN, can take a “close enough” approach to justifying its proposed tariff rates. Contrary to SDN’s argument, the *Cable Competition Order* addresses the Commission’s authority – *not* a commercial carrier’s authority – to set rates. According to the Commission, the “zone of reasonableness” standard is one that is applied to *regulatory agencies, not regulated parties*, as they propose future rates for various utilities:

More generally, the courts have recognized that regulatory agencies are afforded wide latitude in discharging their ratemaking functions. Rather than insisting upon a single regulatory method for determining reasonable rates, courts evaluate whether the “end result” **of a particular regulatory scheme** results in rates that are within a “zone of reasonableness.” Ratemaking under the Communications Act and similar statutes “is not an exact science.” It involves both quantitative and qualitative judgments and predictions about the future. Thus, courts have stressed that “neither law nor economics has yet devised generally accepted standards for the evaluation of ratemaking orders.”<sup>25</sup>

The Commission precedent cited by SDN offers no justification for SDN’s approach to calculating the applicable CLEC benchmark, which plainly produces a rate for terminating access traffic that is unjust and unreasonable. Moreover, even if the notion of a “zone of reasonableness” had some theoretical applicability to a carrier’s rate setting, it would not justify allowing SDN to charge more for terminating access than the carrier to which it benchmarks. Here, whether the carrier to which SDN must benchmark its rates is CenturyLink alone or also

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<sup>24</sup> See SDN Direct Case at 18 (citing *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 F.C.C. Rcd. 4119, 4193 (1994) (“*Cable Competition Order*”).

<sup>25</sup> *Cable Competition Order* ¶ 155 (emphasis added) (footnotes omitted).

includes the LECs subtending SDN's tandem, SDN's terminating access rate is outside any "zone of reasonableness" because it includes a charge that none of the other carriers currently assess on terminating traffic.

### **B. SDN Fails to Meet Its Burden of Proof With Respect to Terminating Traffic**

Because SDN fails to distinguish between the CLEC benchmark rates for originating and terminating traffic, it necessarily fails to meet the burden of proof required to establish that its terminating access rates are just and reasonable. To the contrary, SDN's terminating access rates should be benchmarked solely to CenturyLink's tandem switching element, which is currently \$.002288 per minute in CenturyLink Tariff F.C.C. No. 11.

This conclusion is buttressed by a comparison of SDN's services to those of Iowa Network Access Division d/b/a Aureon. In the course of Aureon's tariff investigation, the FCC determined that Aureon's CLEC benchmark rate was \$0.005634.<sup>26</sup> A significant factor contributing to this rate calculation was that Aureon provided a weighted average of 103.519 miles of transport, which made up \$0.003106 of the total benchmark rate.<sup>27</sup> SDN, on the other hand, does not provide transport services for traffic switched by its tandem when the traffic is terminated to the subtending LECs. Rather, SDN expressly amended its tariff this year to remove any transport options.<sup>28</sup> Thus, it would be plainly unjust and unreasonable to conclude that SDN's terminating access benchmark is more than double Aureon's benchmark (\$0.014203 vs. \$0.005634), where Aureon provides substantial transport services and SDN provides none.

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<sup>26</sup> See *In re Iowa Network Access Division, Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 2018 WL 3641034 ¶ 43 (July 31, 2018).

<sup>27</sup> See *id.*

<sup>28</sup> See Letter from B. Dickens, Jr., Counsel to SDN, to M. Dortch, FCC Secretary (Aug. 31, 2018), attached hereto as **Exhibit A** (explaining that SDN seeks a waiver "to remove transport from its tariff").

Based on the foregoing, SDN's tariffed terminating switched access rate is unlawful because it exceeds the applicable CLEC benchmark. The Commission should order SDN to set the terminating access rate at or below the benchmark rate of \$.002288 per minute.

### **C. SDN Fails to Meet Its Burden of Proof with Respect to Originating Traffic**

As explained more fully below, SDN has also failed to meet its burden of proof with respect to its benchmark for originating access services.

JVCTC and NVC were hoping they could fully support SDN's calculation of its originating access benchmark rate. Indeed, there is much truth to SDN's argument that equal access functionality has played, and continues to play, an important role in promoting access to competitive long-distance services in rural South Dakota, and that LECs, IXC, and consumers alike benefit from carriers' ability to exchange traffic at SDN's tandem switch.<sup>29</sup> First, JVCTC and NVC agree with SDN's assertion that the Commission's decision to exercise its forbearance authority to stop *requiring* carriers from providing equal access does not change the fact that, when SDN provides that service, it should be entitled to be compensated for it because other incumbent carriers would be compensated for the functionality.<sup>30</sup> Second, SDN is also correct that, if SDN did not provide equal access, it would be provided by the subtending LECs in South Dakota, not CenturyLink, because equal access is typically an end office switching function.<sup>31</sup> Third, and finally, NVC and JVCTC agree that, if the subtending LECs participating in or benchmarking to the NECA tariff provided the service, those carriers would be entitled to be

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<sup>29</sup> See SDN Direct Case at 2.

<sup>30</sup> See *id.* at 8.

<sup>31</sup> See *id.* at 6-7, 15-18.

compensated for it by charging for premium local switching until the Commission's end office rate reductions for rate-of-return carriers are fully phased in on July 1, 2020.<sup>32</sup>

Thus, JVCTC and NVC generally agree that SDN has a persuasive argument that the CLEC benchmark rule empowers SDN to bill and collect for "equal access" functionality based on the difference between the premium and non-premium local switching rates for originating traffic, when SDN provides that service. However, despite all of these areas of agreement, JVCTC and NVC are unable to fully endorse SDN's calculation of its originating access benchmark rate because SDN has failed to submit evidence that it actually performed the mathematical rate calculation accurately. Specifically, SDN has not included in the record any documentation showing how it calculated the "weighted average" of the "originating interstate access minutes routed through SDN's tandem from January through July 2018."<sup>33</sup> When JVCTC and NVC sought to provide SDN with the opportunity to correct this oversight, SDN refused.<sup>34</sup>

SDN's refusal to provide either its calculation or even the traffic volumes used in its calculation makes it impossible for JVCTC and NVC to ascertain specifically how SDN determined that \$.01195 is the appropriate weighted average to assign to the equal access functionality that it included in its CLEC benchmark calculation. Furthermore, the lack of data leaves important questions unanswered. For example, a chief question that SDN has failed to answer is how it treated the originating traffic volumes for the three carriers that do not

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<sup>32</sup> See *Connect America Fund Order* ¶ 801; NECA Tariff F.C.C. No. 5, § 17.2.3(A), 53d Revised Page 17-11 & 36th Revised Page 17-11.1.

<sup>33</sup> SDN 2018 Revised Tariff Description and Justification at 3.

<sup>34</sup> Email from S. Taillefer, Jr., Counsel to SDN, to D. Carter, Counsel to JVCTC and NVC (Dec. 14, 2018), attached hereto as **Exhibit B**. Indeed, even though SDN bears the burden of proof, and even though the Commission directly ordered SDN to justify its "use of a weighted average," *Designation Order* ¶ 13, SDN's Direct Case ignores the issue entirely.

participate in or mirror NECA's rates<sup>35</sup> when it prepared the weighted average. Did SDN exclude those minutes entirely, even though its proposed unified tariff rate would apply to those carriers' originating traffic volumes, or did it include those carriers' traffic volumes with no price differential? SDN's failure and refusal to provide sufficient data to explain its calculations means that SDN has not met its burden of proof.<sup>36</sup>

Relatedly, SDN fails to provide sufficient data to meet the burden of proof with regard to the Commission's directive to "justify including the equal access service component in all originating switched access rates as that functionality may not be provided for all calls originating from every one of its subtending LECs."<sup>37</sup> SDN fails to respond to this request in at least two materials respects.

First, as noted above, SDN never addresses how the equal access functionality could be applicable to the three carriers who do not participate in or benchmark to the NECA tariff. By way of example, NVC benchmarks to CenturyLink's tariff,<sup>38</sup> yet SDN expressly argues that "CenturyLink does not and would not provide equal access."<sup>39</sup> Therefore, it logically follows that SDN should not tariff a rate for traffic originated by NVC that includes the equal access functionality. With regard to City of Brookings Municipal Telephone Department and Long

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<sup>35</sup> See SDN Direct Case, Ex. 2 (identifying City of Brookings Municipal Telephone Department, Long Lines Metro, and Northern Valley Communications, LLC, as carriers that do not participate in or benchmark to NECA's tariff).

<sup>36</sup> See, e.g., *July 1, 2004 Annual Access Charge Order* ¶ 24 ("[F]ailure to comply fully with the *Designation Order* leaves us with insufficient and unreliable data, such that we are unable to develop the necessary certainty to permit us to conclude that the rates should be deemed lawful.").

<sup>37</sup> *Designation Order* ¶ 15.

<sup>38</sup> See SDN Direct Case, Ex. 2.

<sup>39</sup> *Id.* at 6.



Lines Metro, the record is devoid of any discussion about whether there is a price differential between the premium and non-premium traffic rates in the carriers' respective tariffs.

SDN's second shortcoming, which relates to the carriers that do participate in or benchmark to the NECA tariff, is its failure to offer any evidence to support the implicit suggestion that these carriers only bill for non-premium local switching service. For example, Exhibit 2 of SDN's Direct Case sets forth the "NECA Rate Band" applicable to each of the subtending LECs, but omits the actual originating local switching rate that is being charged by each of these carriers. SDN has also failed to submit an affidavit representing or warranting that each of the subtending LECs participating in or mirroring the NECA tariff bill the non-premium, rather than the premium, local switching rate. Thus, because SDN has failed to prove that the subtending LECs bill for non-premium local switching, a substantial risk exists that SDN's benchmark would result in double billing the IXC's for the identical equal access service.

In sum, if equal access is equivalent to the differential between the premium and non-premium local switching rate in NECA's tariff, SDN should only be permitted to include that service in its benchmark rate when the subtending LEC is not already billing for that service.<sup>40</sup> Because SDN fails to provide sufficient data to assess this issue, it has not met its burden of proof to establish that including the equal access rate in its originating traffic benchmark calculation would be just and reasonable. For this reason, the Commission should require SDN

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<sup>40</sup> This conclusion is consistent with the Commission's *Eighth Report and Order*, which concluded that when a CLEC provides only a "portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC," its rate must "not exceed the rate charged by the competing ILEC for the same access services." *In re Access Charge Reform et al.*, Eighth Report and Order and Fifth Order on Reconsideration, 19 F.C.C. Rcd. 9108, 9116 ¶ 17 (2004).

to either revise its originating access benchmark or fully justify its originating access benchmark calculation through the submission of all necessary data.

#### **IV. CONCLUSION**

SDN has failed to meet its burden of proof to establish that it appropriately calculated the CLEC benchmark rates that it contends are above its cost-based rates. SDN's terminating and originating rates must be examined separately.

With respect to SDN's terminating access rates, it is clear that the benchmark rate applicable to SDN's terminating services is \$.002288 per minute, which is well below the cost-based rate SDN submitted. Accordingly, the Commission should order SDN to refile a tariff at or below this terminating rate.

And with respect to its originating access rates, JVCTC and NVC believe that SDN has a valid argument that it should be entitled to bill for equal access functionality, provided that the traffic originates from a subtending LEC that only bills for non-premium local switching pursuant to the NECA tariff. However, because SDN has failed to provide sufficient data to establish which rates the relevant subtending carriers bill and has failed to demonstrate that it correctly calculated the weighted average for its equal access service, the Commission should order SDN to either (1) refile its tariff and divide its originating access rates into one for carriers billing non-premium local switching pursuant to NECA and one for all other subtending LECs; or (2) file a composite rate for originating traffic only if it substantiates that it has appropriately weighted the rate based on whether the subtending LEC bills for premium or non-premium local switching.

Dated: December 18, 2018

Respectfully submitted,



G. David Carter  
John C. Nelson  
Innovista Law PLLC  
1825 K Street, NW  
Suite 508  
Washington, DC 20006  
202-869-1502 (Tel.)  
202-869-1503 (Fax)  
[david.carter@innovistalaw.com](mailto:david.carter@innovistalaw.com)  
[john.nelson@innovistalaw.com](mailto:john.nelson@innovistalaw.com)